BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICHAEL LEIKAM	)	
Claimant	)	
V.	)	
	)	
FLATLANDER DIRT WORKS LLC	)	Docket No. 1,069,935
Respondent	)	
AND	)	
	)	
ADDISON INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant, through Mitchell W. Rice, of Hutchinson, requested review of Administrative Law Judge Bruce Moore's February 17, 2015 Award. James B. Biggs, of Topeka, appeared for respondent and insurance carrier (respondent). The Board heard oral argument on July 7, 2015.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Respondent agreed that if the Board ruled in claimant's favor regarding causation, it would be responsible for additional temporary total disability (TTD) benefits and unpaid and future medical expenses.

ISSUES

Claimant fell from a ladder on February 3, 2014. Claimant alleges he herniated a lumbar disc and developed low back and bilateral leg symptoms as a result. The parties disagree whether the accident was the prevailing factor in claimant's injury, medical condition, impairment or disability. The judge concluded claimant failed to prove his accident was the prevailing factor causing his low back complaints, need for treatment or resulting disability.

Claimant seeks reversal, arguing the judge should have granted benefits based on the prevailing factor opinion of the court-ordered neutral physician. Claimant asserts he is entitled to a 68% work disability, temporary total disability benefits, past medical expenses and future medical benefits. Respondent requests claimant be denied any benefits, primarily contending he did not have low back or leg symptoms for 17 days post-accident, a period too long to connect such complaints to the accident. Respondent contends claimant's symptoms are due to degenerative disc disease. Respondent asks that the Board affirm the judge's decision.

The issues for review are:

1) Is claimant's accident the prevailing factor in causing his injury, medical condition and resulting disability or impairment?

2) What is the nature and extent of claimant's disability?

3) Is claimant entitled to additional TTD benefits from May 13, 2014 until September 5, 2014?

4) Is respondent responsible to pay outstanding medical bills totaling $10,147, payment of $500 for unauthorized medical or future medical benefits?

FINDINGS OF FACT

Claimant, 35 years old, began working for respondent as a roustabout in November 2013. He dug trenches for water and oil lines, glued and connected PVC pipe, hooked up pumping units, assembled pumping jacks and set tanks.

Claimant was helping other workers load tanks on to a trailer on February 3, 2014.[1] He was on the fourth or fifth rung of a ladder. The ladder was on a trailer leaning against an oil tank. The ladder fell. Correspondingly, claimant fell off the ladder and struck his chest on the trailer deck before flipping head over heels to the ground onto his back. Claimant estimated he fell between nine and 15 feet. According to claimant, "[e]verything" hurt, including his chest and ribs.[2] He testified he hurt his low back on February 3.[3] Claimant testified that on the date of his accident, his low back pain exceeded a 10 on a 0-10 scale in which 10 is the most pain.

Claimant reported the accident to respondent. Joel Younger, respondent's owner, testified he and his wife, Amber Younger, asked claimant if he hurt his head, neck or back in the accident and indicated claimant responded, "no, I'm good."[4] Claimant did not request medical treatment. An accident report was not completed. According to the Youngers, claimant continued working his regular duties after the accident and never asked for any type of accommodation. Ms. Younger testified claimant's post-accident work was the same he always performed and it was not heavy work. Mr. Younger characterized claimant's work as labor intensive.

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[1] Unless noted otherwise, all additional dates concern 2014.

[2] Claimant Depo. at 14.

[3] *Id.* at 25.

[4] Joel Younger Depo. at 6; see also Amber Younger Depo. at 7. Ms. Younger was not married to Mr. Younger at the time of claimant's accident.

Ms. Younger is responsible for handling respondent's workers compensation claims. She testified she asked claimant about one week, perhaps longer, after the accident if he was able to work and not sore, and he replied he was not hurt. Claimant could not recall if Ms. Younger asked him about his injury after February 3, but doubted she did.

Claimant testified he continued to work his regular duties to the "best of his abilities"[5] or "as good as [he] could."[6] He testified he was "in pain from when it happened"[7] and "got to a point where [he] could not function."[8] February 24 was the last day he was able to finish his work. Claimant testified he did not work at all after February 24.

On February 25, claimant awoke in extreme pain. He testified his pain level was a "28" on the 0-10 scale and he "could barely walk."[9] For the first time, he sought medical treatment for his accidental injury. He obtained a lumbar spine x-ray and medication at his primary care physician's office. The evidentiary record contains very little documentation of this visit, but the x-ray report states, "FALL/LOW BACK PAIN."[10]

That same day, Mr. Younger received a text message from claimant saying he would not be in and was going to see a doctor about his back. According to the Youngers, they first became aware claimant was alleging he hurt his back at work based on his February 25 text message.

On March 4, claimant had an MRI showing moderate narrowing of the L5-S1 disc space with disc dehydration and annular fissure, mild to moderate facet arthropathy at L4-5 and L5-S1 and a disc protrusion at L5-S1. Thereafter, claimant had physical therapy for almost a month with little improvement before being referred to Vivek Sharma, M.D.

In March, after learning claimant turned in a doctor's visit as a work-related injury, Ms. Younger alerted respondent's workers compensation carrier. Ms. Younger testified she investigated the claim and other employees, Cody Schultz and Dakota Smith, told her claimant hurt his back while getting off a couch and he never showed signs of being hurt while working. She understood from these other employees that claimant may have simply "let go of the ladder."[11] Schultz and Smith did not testify.

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[5] Claimant Depo. at 17.

[6] R.H. Trans. at 24.

[7] Claimant Depo. at 22.

[8] R.H. Trans. at 16.

[9] Claimant Depo. at 24.

[10] Sharma Depo., Ex. 2 at 13.

[11] Amber Younger Depo. at 11.

Christine Zetocka, a senior workers compensation representative for United Fire and Casualty, a company affiliated with respondent, took a recorded statement from claimant on March 5. Claimant told Ms. Zetocka he had chest, rib and whole body aching on his date of accident, but he sought no medical attention until February 25. Ms. Zetocka questioned claimant why he waited so long to seek medical attention and claimant replied:

> A. Um-I don't know. I mean, because I was, you know, my ribs were getting better and I was just working through it, and I went to work on Monday the, I don't remember what day it was, Monday the 20, I don't know. The last Monday of February, I went to work on Monday and my back started really hurting like that Thursday and Friday before and then on Monday it was just completely gone. I couldn't do anything.
>
> Q. What-what happened to make your back start hurting on that Thursday and Friday given it was a couple weeks out from when the accident happened? Did you do anything?
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> A. No-no, just like I said. I continued working from _____ injury until Monday and then I went to the doctor that Tuesday.
>
> Q. Did you make complaints to your employer about the injury, you know, your back bothering you between the 3rd and the 25th?
>
> A. Um-no, I complained about my ribs still hurting through that period and then once my ribs stopped hurting my back flared up, I mean, I went and just had an MRI done yesterday and the x-rays on Tuesday, last Tuesday.[12]

Unlike in his recorded statement, claimant denied never mentioning his back injury to respondent before February 25.[13] He also claimed he was having back pain before February 20:

> Q. Was there anything that happened February 20th that, you know, boom, my back now has flared up to the point where I can't work, or did it gradually worsen?
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> A. It happened before that. I mean, that was the day I went to work and that's when I knew I could not do it anymore.[14]

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[12] Zetocka Depo., Ex. 1 at 7.

[13] R.H. Trans. at 24.

[14] *Id.* at 39.

Further, Ms. Zetocka asked claimant about the onset of his leg symptoms:

> Q. Okay. Both leg symptoms, did those start, um–after the Thursday, Friday when things got worse for you?
>
> A. Uh–yes. [15]

On April 1, claimant saw Dr. Sharma, who is an orthopedic surgeon whose practice is 85% spine and 15% general orthopedics. Claimant told Dr. Sharma that he injured his back on February 3, "after which he had some pain but went to seek treatment after a week or two . . . ."[16] Claimant complained of severe low back pain with bilateral leg pain, right more than left, which "started after injury at work."[17] Claimant's injury date was listed as: "Feb[.] 3, 2014 - Coming down off a ladder at work; fell. Landed on back."[18] Claimant had equivocal straight leg raise testing. Dr. Sharma diagnosed claimant with an L5-S1 disc herniation, annular tear and disc degeneration. The doctor recommended steroid injections. Dr. Sharma imposed light duty work restrictions. Claimant indicated he asked respondent to provide light duty work, but such work was not available.

On May 13, claimant returned to Dr. Sharma after having little relief from lumbar epidural steroid injections on April 23 and May 6. Dr. Sharma testified claimant had a positive straight leg raise test on the right, which would be objective evidence of radiculopathy. Dr. Sharma recommended a CT discogram and kept claimant on light duty. According to claimant, Dr. Sharma recommended he have low back surgery.

Dr. Sharma testified claimant's MRI showed degenerative disc disease, which was "absolutely not" caused by his work, but likely due to congenital, age-related or developmental factors.[19] Dr. Sharma also testified claimant had a disc herniation or an annular tear. Dr. Sharma discussed whether he could state with certainty regarding the onset of such findings:

> [L]ooking at his MRI picture, I cannot tell you with certainty whether - - because some of these changes are preexisting, like degenerative disk disease, but even with a disk bulge or protrusion, whether that happened or became symptomatic with this injury, I do not - - I cannot tell you for certainty because we don't have an MRI prior to this episode.[20]

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[15] *Id.*, Ex. 1 at 10.

[16] Sharma Depo. at 6.

[17] *Id.*, Ex. 2 at 6.

[18] *Id.*

[19] *Id.* at 10.

[20] *Id.* at 16.

According to Dr. Sharma, it was "probable" claimant sustained a disc herniation when he fell.[21] He also testified the prevailing factor in claimant's need to seek treatment was the February 3 fall at work. Dr. Sharma added, "[U]nder reasonable medical probability . . . he had a degenerative disk when - - and angular tear or protrusion happened during that injury. Again, I cannot tell you whether that's the case."[22]

After Dr. Sharma indicated symptoms of a disc herniation are usually present within a week, the following dialogue occurred:

> Q. Okay. And if the testimony in this case indicates Mr. Leikam didn't present any type of symptoms for a period of seventeen days, continued doing his regular job duties with no complaints of back pain, would that be something that normally results from a traumatic herniation?
>
> A. It's probable, but unlikely. Sometimes there are tears which happen but which progress with, you know, activity.[23]

The doctor also stated if claimant had "no back pain for over seventeen days[,]" his disc injury probably did not happen on February 3, but added it was "possible" and "can happen," before stating he could not provide an opinion.[24] He noted claimant's delayed onset of symptoms probably showed degenerative disc disease was a major contributing cause of claimant's symptoms.[25]

Dr. Sharma could not say within reasonable medical "certainty" when claimant's annular tear or disc herniation occurred or if it occurred on February 3.[26] If claimant's disc changes predated the February 3 accident, Dr. Sharma stated the accident would only have aggravated or exacerbated such preexisting condition. When asked if claimant's symptoms just happened to develop within a couple weeks after his February 3 trauma, Dr. Sharma responded, "I don't know. As I said, I do think that his injury was related to the symptoms he presented with, but whether the MRI changes were related to the injury or not, I cannot answer."[27]

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[21] *Id.* at 12.

[22] *Id*. at 18-19. "Angular" probably should read "annular."

[23] *Id*. at 13.

[24] *Id.* at 19, 21.

[25] *Id.* at 20.

[26] *Id.* at 13-14.

[27] *Id*. at 23.

Brent Adamson, M.D., a board certified orthopedic surgeon, performed a records review at respondent's request to address causation. He did not physically examine claimant. In his summary of medical records, Dr. Adamson noted claimant was seen by a physician assistant on February 25, complaining about his February 3 fall and that his "[b]ack pain started on Thursday 2/20/14."[28] Dr. Adamson indicated an in-person examination and interview of claimant would not have been helpful to address causation, although obtaining a history from claimant would be helpful.

Dr. Adamson diagnosed claimant with a herniated disc, degenerative disc disease, degenerative lumbosacral spine spondylosis, facet arthropathy and low back pain. Dr. Adamson imposed work restrictions of no stooping, bending, squatting, climbing or lifting over 15 pounds. Dr. Adamson recommended epidural steroid injections and if those failed to provide relief, lumbar surgery.

Dr. Adamson believed claimant's mechanism of injury was consistent with the diagnosis of herniated disc, but did not correlate with his degenerative disc disease or facet arthropathy. The doctor stressed the medical records he reviewed showed claimant first had onset of back pain on February 20:

> It is my opinion that within a reasonable degree of medical certainty the patient's accident was not the prevailing cause of his back pain and radicular symptoms which started 17 days after the work event. I would expect that if the work injury [was] the prevailing cause of his symptoms, they would have started within hours of the accident, not 17 days. This extended delay in the appearance of symptoms is more likely evidence for the natural progression of back pain that occurs in the course of everyday living and not the result of a specific injury. The fact the MRI demonstrated degenerative disc disease and facet arthropathy which would be pre-existing conditions, makes them the prevailing cause of his current symptoms.[29]

Dr. Adamson testified claimant's fall was not the prevailing factor for his current problems and need for medical treatment. Dr. Adamson testified if claimant's annulus was damaged from trauma, he would have expected the symptoms to have occurred reasonably soon after the fall, within a day or two, but 17 days was unreasonable. Dr. Adamson noted claimant's MRI findings had more degenerative changes than usual for his age and his symptoms were due to the natural course of a degenerative back and aging. He opined claimant had onset of symptoms 17 days post-accident that was just coincidental.

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[28] Adamson Depo., Ex. 2 at 1.

[29] *Id*., Ex. 2 at 2.

Alexander Bailey, M.D., a board certified orthopedic surgeon, performed a records review at respondent's request. He did not physically examine claimant. Dr. Bailey summarized a medical record as showing claimant went to Hays Medical Group on February 25 for a fall that occurred on February 3: "This was the new patient visit with the complaint of pain. Indicates he comes in this morning for acute onset low back pain, fell at work 02/03/14."[30] Dr. Bailey testified that his review of the records showed claimant first complained of low back pain on February 25 and reported his pain began on February 20.

Dr. Bailey indicated claimant's accident was not the prevailing factor in claimant's back pain and radicular symptoms. Dr. Bailey stated:

> There is a significant quiescent time, no report to coworkers, no observed limitations and nearly 17 days with multiple work status shifts apparently unaffected. I believe this delay exceeds any reasonable connection to a work-related fall. Although one can identify a quiescent period of time of 24-48 hours, 17 days is not a reasonable quiescent time between fall, continued work activities and then the sudden onset of intractable symptomatologies. His MRI scan is consistent with some degenerative findings, low-grade annular tear with some disc bulging. This is a degenerative finding or off-work event in my opinion. It is my assessment that the prevailing factor for the need for medical and/or further attention to the lumbar spine to be a personal medical condition and not directly related to the fall of 02/03/2014. This is based on medical record evidence and despite an observed fall, the quiescent period of 17 days with continued work activities, in my opinion, eliminates the option of significant fall-related condition or action to the lumbar spine resulting in the need for further evaluation or treatment.[31]

Dr. Bailey acknowledged obtaining a history from claimant, not simply from review of the medical records, could have been taken into consideration. Like Dr. Adamson, he did not think an in-person evaluation would help determine causation.

Dr. Bailey testified claimant's February 3 accident was not the prevailing factor for his back pain and radicular symptoms. Dr. Bailey noted claimant's back pain would correlate to his accident if he reported back pain to his employer and sought medical treatment just after the fall, but medical records did not support such conclusions. According to Dr. Bailey, disc abnormalities are symptomatic within one or two days. Dr. Bailey indicated claimant's back symptoms developing on February 20 was coincidental due to unknown "life" consequences and not related to the accident. Dr. Bailey noted claimant had degenerative disc disease – unrelated to the fall – that became symptomatic on February 20 "more likely" based on "what he was doing" on or about that date.[32]

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[30] Bailey Depo., Ex. 2 at 3.

[31] *Id*., Ex. 2 at 3.

[32] *Id*. at 14, 20.

The judge appointed Edward Prostic, M.D., a board certified orthopedic surgeon, to perform an independent medical examination (IME) and provide a prevailing factor opinion, among other things. Claimant saw Dr. Prostic on September 5 and complained of center and right-sided low back pain with radiation down the right leg to the foot without numbness or tingling. Claimant told Dr. Prostic he had a gradual worsening of low back pain. In contrast to claimant's history, Dr. Prostic specifically summarized that notes from claimant's doctor's physician assistant, Jennifer Williams, stated "onset of back pain was reported as February 20, 2014."[33]

Dr. Prostic's physical examination revealed abnormalities of midline tenderness at L5 and some lost range of lumbar motion. Dr. Prostic concluded claimant "suffered injury at L5-S1 where he had predominantly central disc protrusion . . . mild right S1 radiculopathy . . . [a]nd early signs of some instability at L5-S1."[34]

Dr. Prostic recommended intermittent heat or ice and massage, therapeutic exercises and continued use of over-the-counter medicines. Dr. Prostic assigned an 8% functional impairment to the body as a whole pursuant to the AMA *Guides.*[35] Dr. Prostic opined claimant's February 3 accident was the prevailing factor in claimant's injury, medical condition, need for medical treatment and resulting disability or impairment. The doctor did not indicate claimant's injury solely aggravated, accelerated or exacerbated a preexisting condition or rendered a preexisting condition symptomatic. Dr. Prostic testified claimant will more probably than not need future medical treatment because of his injury.

Dr. Prostic acknowledged he found no objective findings for radiculopathy and there was no nerve conduction study showing radiculopathy. Dr. Prostic testified claimant's disc space narrowing was a degenerative condition that "likely preceded the injury."[36] Dr. Prostic testified symptoms of a disc protrusion start almost immediately, or within three or four days, and he would find it "unusual" if claimant had a disc protrusion, but told the claims adjuster he had no low back complaints between February 3 and February 20.[37]

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[33] Prostic Depo., Ex. 2 at 1.

[34] Prostic Depo. at 6.

[35] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

[36] *Id*. at 13.

[37] *Id*. Dr. Prostic was actually asked if it would be unusual for claimant to tell the claims adjuster he had no low back complaints from February 3 to February 25 if he had a disc protrusion. Insofar as claimant told the claims adjuster his back pain started "really hurting" on February 20, we have adjusted Dr. Prostic's testimony to the facts of the case.

Dr. Prostic permanently restricted claimant to occasional lifting 40 to 50 pounds, lifting 20-25 pounds frequently, avoid frequent bending or twisting at the waist or forceful pushing or pulling. Dr. Prostic testified claimant would be unable to perform 17 of 25 tasks identified by Robert Barnett, Ph.D., a rehabilitation counselor/evaluator and job placement specialist, for a 68% task loss. Coincidentally, Dr. Barnett testified claimant could perform sedentary or light work and earn minimum wage for a 68% post-injury wage loss.

At the regular hearing, claimant continued to experience back pain and a sharp, shooting pain down his leg when standing up, walking or squatting. He has looked for work within his restrictions, but has not applied for work or filed for unemployment.

Claimant testified he contacted respondent about returning to work. Ms. Younger testified she attempted to contact claimant two to four times after February 25, but received no response. Mr. Younger testified he did not hear from claimant about returning to work until late November. Mr. Younger testified the job duties of a roustabout are outside claimant's restrictions. He also indicated respondent would need more time to figure out if it had work claimant could perform.

The February 17, 2015 Award stated claimant did his work after his accident "without apparent pain or limitation."[38] The Award further stated, in part:

> Whether Claimant's February 3, 2014 fall was the prevailing factor in causing his back complaints and need for treatment turns on when his back complaints developed. In this vein, Claimant's testimony has been less than clear. He testified that he "hurt all over" from the date of the fall, but he never testified specifically that his ***back*** hurt from the date of the fall. When questioned by the insurance adjuster, Claimant stated this his back "started really hurting like that Thursday and Friday before and then on Monday it was just completely gone." He also acknowledged that he never complained about his back prior to February 24, 2014, performed his regular duties, and his back "flared up" when his ribs stopped hurting. Claimant never testified when his ribs stopped hurting, but the court concludes that the back must have "flared up" on or about Thursday, February 20, 2014, when it "started really hurting." If Claimant's back did not become symptomatic until February 20, 2014, then the medical evidence is generally in accord that the February 3, 2014 fall was not the prevailing factor in causing Claimant's medical condition (symptomatic degenerative disc disease), his need for treatment of his degenerative disc disease, or his resulting temporary total or permanent partial disability. Notwithstanding Dr. Prostic's opinion that the fall was the prevailing factor in rendering Claimant's pre-existing degenerative disc disease symptomatic, Dr. Prostic relied on a history of back that gradually worsened from the date of the fall. That history is not supported by the record before the court.

[38] ALJ Award at 4.

> In any event, no physician testified that, to a degree of medical probability, Claimant suffered a disc herniation as a result of the February 3, 2014 fall. Dr. Sharma initially thought the fall caused the disc herniation but acknowledged that he didn't know, particularly because of other degenerative changes present in Claimant's spine, as seen on the MRI. Without proof a disc herniation as a result of the February 3 fall, the court is left with a pre-existing condition (degenerative disc disease of the lumbar spine) rendered symptomatic.
>
> **K.S.A. 2013 Supp. 44-508(f)(2)** provides, however, that
>
> > [a]n injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> If the fall of February 3, 2014 did not cause a disc herniation, then at most it rendered symptomatic Claimant's pre-existing degenerative disc disease. Alternatively, if the history Claimant gave Dr. Prostic is believed, he had gradually increasing lower back pain leading up to February 20, 2014, as he continued to perform physically demanding work, and that continued heavy work activity rendered symptomatic his pre-existing degenerative disc disease. In either event, the February 3, 2014 fall was not the prevailing factor in causing Claimant's low back complaints. Rather, as opined by Drs. Adamson and Bailey, the prevailing factor in the development of those complaints was the pre-existing degenerative disc disease.
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> **Claimant has failed to sustain his burden of proof that the February 3, 2014 fall was the prevailing factor in causing Claimant's low back complaints, need for treatment, or resulting temporary total or permanent partial impairment or disability.** Accordingly, he is not entitled to additional TTD benefits, payment of medical expenses or future medical treatment.[39]

The judge awarded claimant up to $500 for unauthorized medical allowance. Claimant appealed.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[40] The burden of proof shall be on the claimant and the trier of fact shall consider the whole record.[41]

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[39] ALJ Award at 8-10.

[40] K.S.A. 2013 Supp. 44-501b(b).

[41] K.S.A. 2013 Supp. 44-501b(c).

K.S.A. 2013 Supp. 44-508 provides, in part:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . .

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-555c(a) states, in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the appeals board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

Board review of a judge's order is de novo on the record.[42] The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[43] The Board, on de novo review, makes its own factual findings.[44]

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[45] The trier of fact decides which testimony is more accurate and/or credible and may adjust the medical testimony with the testimony of claimant and any other testimony relevant to the issue of disability. The trier of fact must decide the nature and extent of injury and is not bound by the medical evidence.[46]

ANALYSIS

While this is a close case, the Board affirms the judge's ruling. Had claimant sustained a traumatically-induced disc lesion, the medical evidence indicates he would have had corresponding symptoms immediately or within just a few days after his February 3 accident. Every testifying physician came to this conclusion. Drs. Adamson and Bailey are the most credible medical experts in this case.

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[42] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[43] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[44] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[45] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[46] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *superseded on other grounds by statute.*

We do not have for our review all of the initial February 25 medical records. However, claimant's medical history, at least summarized by the testifying physicians, is that he did not have onset of back pain until February 20, some 17 days after the accident. The credible medical evidence is that onset of radicular symptoms 17 days post-accident is too tenuous to support a cause and effect relationship. Claimant also told the claims adjuster his back only really started hurting on February 20 and his leg symptoms started after February 20. Based on the credible evidence, a herniated lumbar disc would have caused radicular symptoms before February 20. We also agree with the judge that Dr. Prostic's prevailing factor opinion was based on an incomplete picture.

Additional evidence supports our conclusion. Claimant initially denied to respondent that he had a back injury. During the 17 days, he was able to do his regular and physical work before abruptly being nearly unable to walk. Claimant admitted to the claims adjuster that he did not complain to respondent about his back in the interim. At the regular hearing, he denied having not told respondent about back pain between the time of his accident and his last day worked. Such 180° course change is highly suspect. The judge impliedly did not believe claimant's testimony that he had back pain from the date of the accident forward. The more likely cause – the prevailing or primary factor – in claimant's belated back and leg symptoms, injury, medical condition, impairment and disability is his underlying and advanced degenerative disc disease.

CONCLUSION

The judge's Award is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2015.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

DISSENT

We Board Members respectfully dissent and would reverse the judge's ruling.

Claimant not only fell from a significant height, he fell on his back, a fact omitted from the findings of fact in the appealed decision. Claimant's traumatic fall in which he landed on his back is the most likely cause and the prevailing factor for his injury, medical condition, impairment and disability. We do not put much weight in the joint opinion of Drs. Adamson and Bailey that claimant's degenerative disc disease simply revealed itself 17 days post-injury as an unfortunate coincidence of life. Dr. Bailey's testimony that claimant's symptoms began on February 20 based on whatever activity claimant was doing on that date is speculative.

The underlying decision seems to hinge on an incorrect premise, namely the concept that claimant was symptom-free of back or leg pain for 17 days after his accident. This theory is a recurring theme in the questioning of claimant and the medical experts, but it is not supported by the credible evidence. Claimant was not asked in his recorded statement when his back symptoms began. Claimant did not tell the claims adjuster he had onset of his symptoms on February 20. Claimant did not deny back pain between the time of his accident and February 20. Rather, he indicated February 20 and thereafter was when his symptoms *worsened*. The fact claimant's back pain "really" got bad on February 20 strongly suggests he had symptoms beforehand as well.

Moreover, claimant testified he had back pain from the time of his accidental injury and he did his work as best he could, but with increasing difficulty until he could function no longer. We would reach a factual finding contrary to the judge's conclusion that claimant did his work "without apparent pain or limitation." From the medical experts' summation of a February 25 medical report – a document that is not in evidence – we would conclude claimant related his symptoms to his February 3 fall and not to some other cause. Claimant told Drs. Prostic and Sharma his injury was due to his accident. Claimant did not have the chance to tell record reviewers, Drs. Adamson and Bailey, why his back and legs hurt. They indicated obtaining a history directly from him may have been helpful.

While the judge stated claimant's testimony was "less than clear," he did not make a credibility determination. Claimant's allegation of back pain is not inconsistent with saying he "hurt all over." While the appealed ruling states claimant never specified his back hurt from the date of the fall, his deposition and regular hearing testimony illustrate he fell on his back and was injured thereafter. "A claimant's testimony alone is sufficient evidence of his own physical condition."[47] Claimant's testimony is sufficiently credible.

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[47] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 95, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

Unlike the appealed ruling, we would conclude Dr. Prostic was specifically aware of a medical record stating the onset of claimant's symptoms was on February 20, which was in contrast to claimant telling him he had gradual worsening of low back pain. Dr. Prostic's report documents this inconsistency. Also, when presented with the suggestion claimant told the claims adjuster he had no low back symptoms for 17 days after the accident, Dr. Prostic simply indicated such scenario would be "unusual." In actuality, claimant never told the claims adjuster he had no low back pain for 17 days after his accident. Dr. Prostic did not alter his prevailing factor opinion. Even being aware of contrary histories and respondent's position, Dr. Prostic, the court-ordered and neutral physician, nevertheless opined claimant's accident was the prevailing factor in his injury, medical condition, impairment and disability.

Contrary to the appealed decision, Dr. Prostic did not conclude the February 3 fall was the prevailing factor in rendering claimant's degenerative disc disease symptomatic and causing claimant's low back pain and radicular complaints. Instead, Dr. Prostic concluded claimant "suffered injury at L5-S1 where he had predominantly central disc protrusion . . . mild right S1 radiculopathy . . . [a]nd early signs of some instability at L5-S1."

We acknowledge Dr. Sharma's testimony appears facially inconsistent. However, a closer reading suggests he opined claimant's herniated disc was due to the February 3 accident – as a matter of probability – even though he could not make such conclusion as a matter of medical certainty. The standard of proof is based on probability, not certainty.[48] Dr. Sharma testified multiple times as to the probability that claimant's fall caused his herniated disc. His testimony regarding medical "certainty" is legally irrelevant.

We would further find:

- Claimant should be entitled to additional TTD from May 3 through September 5, 2014.

- Claimant should have a 68% work disability. Mr. Barnett's opinion regarding claimant's wage earning capability is not well-explained, but it is the only evidence in the record. Claimant did not voluntarily resign or abandon his job. He was not terminated for cause. Respondent did not offer him accommodated work.

- Claimant should be entitled to payment of his unpaid medical expenses that resulted from his accidental injury, as based on the Kansas Workers Compensation Schedule of Medical Fees. Claimant should be entitled to future medical treatment.

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[48] See *Turner v. State*, No. 110,508, 2014 WL 3022644 (Kansas Court of Appeals unpublished opinion filed June 27, 2014).

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